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In the  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1947

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No. 707

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AMBROSIA CHOCOLATE COMPANY,  
*Petitioner*

*vs.*

AMBROSIA CAKE BAKERY, INC.,  
*Respondent*

---

ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

---

BRIEF FOR RESPONDENT IN OPPOSITION

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**OPINIONS BELOW**

The opinion of the Fourth Circuit (R. 104) is reported at 165 F. (2d) 693. The opinion of the District Court, not officially reported, appears in the record. (R. 2-6)

**JURISDICTION**

The jurisdiction of this Court is invoked under Title 28 U. S. C. § 347(a) (Sec. 240(a) Judicial Code).

**STATEMENT OF THE CASE**

Additional facts found by the District Court, which were omitted in petitioner's Summary Statement of the

Matter Involved and which are deemed necessary to a proper consideration of the Petition, are as follows:

Petitioner was not the first nor the only registrant of the word "Ambrosia" in the U. S. Patent Office, as a trademark. More than five years prior to Petitioner's first registration, the word "Ambrosia" had been registered in the Patent Office as a trade-mark for the sales of syrup, lard, dried and canned fruits and honey, all food products. After Petitioner's registration, the word "Ambrosia" was likewise registered by persons other than Petitioner, upon various days and dates, for the sale of various articles in Patent Office Class 46, Foods and Ingredients of Foods, including milk, cream, soft drinks, wheat, rye and corn flour. It was also registered for various articles in other classes. The last registration was on July 10, 1945 to cover the sale of malt beverages in Class 48. The word "Ambrosia" has been registered in the Patent Office a total of fifteen times. (R. 9; Findings of Fact No. 9)

Petitioner's registrations of the word "Ambrosia" in the Patent Office did not encompass the entire Class 46, Foods and Ingredients of Foods, of the Patent Office. On the contrary, the registrations covered only the very limited articles of chocolate and chocolate products, in Class 46. (R. 7; Findings of Fact No. 6). In the words of the District Court:

"When plaintiff adopted it, with deliberation it restricted it to candy and chocolate and cocoa, and its new registration, although somewhat enlarged, still narrowed it to candy, chocolate coatings, chocolate and cocoa. There is no suggestion in its registration of any intention to apply it to bread or cake or other products made from flour—the product of small grain. \* \* \* To bring within its orb every product

made from the flour of small grain would grant to it a monopoly excluding others from a field plaintiff never has occupied, and so far as this record discloses, never intends to occupy." (R. 4)

The products of Petitioner and Respondent are not competitive. Their businesses are in separate and distinct fields of commercial enterprise. No consumer or purchaser who exercised reasonable diligence would be confused as to origin of their products by reason of their common use of the word "Ambrosia". (R. 13; Findings of Fact No. 18, 19). There has been at no time any actual confusion between their respective products. Petitioner's own President testified as follows (R. 81):

"Q. Did the plaintiff corporation at any time prior to the bringing of this suit have any complaint from any one of any confusion as to the point of origin of the goods produced and manufactured by plaintiff and point of origin of the goods produced and manufactured by the defendant?

A. No.

Q. As a matter of fact, the plaintiff corporation never came in contact in any of its business in North Carolina, in competition or otherwise, with the goods of the defendant prior to bringing this suit?

A. No."

A short time prior to February 5, 1938, petitioner's representative called on respondent's president and attempted to persuade him to have the three affiliated Ambrosia Cake Companies use the products of petitioner, particularly its cocoa powder, in their bakery operations.

Petitioner's representative indicated he had had knowledge of each of the bakeries operated by companies and expressed friendly interest in the companies because of their use of the name and mark "Ambrosia".

Petitioner's vice-president, on February 5, 1938, wrote respondent's president a letter (R. 97; Defendant's Exhibit A) expressing regret that its cocoa powder had not proved satisfactory, made suggestions and explanations. A formula was enclosed in the letter for preparing and manufacturing a devil's food cake, which had proven popular in petitioner's trade territory, "to aid defendant to expand and increase its business in manufacturing and selling Ambrosia Cakes, and to encourage defendant to use plaintiff's products in making the Ambrosia Cakes". (R. 16; Findings of Fact No. 32). During the succeeding eight-year period with full knowledge of respondent's operations, petitioner made no protest or objection to respondent's use of the name "Ambrosia" and stood idly by, while respondent continuously expanded its manufacturing and selling operation, using the mark "Ambrosia," and expended large sums of money in local and national advertising and sales promotion of the mark on its bakery products, resulting in an increase in its annual gross business of over 300% from \$179,772.66 during the year 1937 to \$608,401.48 during the year 1945 (R. 16, Findings of Fact No. 32; R. 99, Defendant's Exhibit Q). This suit was brought May 19, 1946.

### SUMMARY OF ARGUMENT

1. Writ of certiorari should not be granted merely to review the evidence or inferences drawn from it. Whether petitioner acquiesced in the alleged trademark infringement and is estopped depends upon the facts.



Laches, acquiescence and estoppel on the part of petitioner here were specifically found by both lower courts and these concurrent findings, upon which the decision below primarily rests, should not be disturbed, where as here they are not only not plainly without support, but are fully supported by the evidence.

2. \* No conflict exists in the decision of the Fourth Circuit with the decision of any other circuit or of this Court. The Fourth Circuit in its unanimous opinion makes specific reference to "the utter inapplicability to the instant case" of the decisions here primarily relied on by petitioner to support his "out-of-harmony" argument.

3. No important question of trade-mark law of general importance is here presented. The Fourth Circuit has not denied petitioner's property right in its trade-mark, as stated by petitioner. It has merely refused to expand petitioner's ownership of a frequently registered, commonplace, undistinctive word of long usage, signifying super-excellence of product, into a field beyond that covered by petitioner's Patent Office registrations and beyond that contemplated by petitioner. Petitioner's ownership of the mark "Ambrosia" on chocolate, cocoa and candy, the items listed in its registration applications, was not denied by the lower courts and is not an issue in this case.

4. The accepted and usual course of judicial proceedings was strictly followed by the District Court in the manner and form of preparation of its findings and particularly in the carefully prepared, separate written opinion specifically indicating the factual basis for its ultimate conclusions.

## ARGUMENT

1. Writ of Certiorari should not be granted merely to review the evidence.

This Court has said:

"Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413; *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496, 69 L.Ed. 925. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. *United States v. Chemical Foundation*, 272 U.S. 1, 14, 47 S.Ct. 1, 6, 71 L.Ed. 131; *United States v. McGowan*, 290 U.S. 592, 54 S.Ct. 95, 78 L.Ed. 522; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374."

*General Talking Pictures Corp. v. Western Electric Co.* (1938), 304 U.S. 175, 178, 58 S.Ct. 849, 851.

The District Court, in dismissing the complaint specifically found laches, acquiescence and estoppel. These findings were concurred in by the Fourth Circuit and formed one of the primary grounds for its affirmance of the decree of the District Court. In this connection, the Fourth Circuit stated (R. 106):

"We must conclude that the District Court correctly decided that here was adequate basis for an absolute defense on the ground of laches and acquiescence by plaintiff, amounting to estoppel. During the years intervening between 1938 (the year the above transactions occurred) and 1946 (when the instant civil

action was instituted) defendant and its affiliates, by extensive advertising of the name "Ambrosia" for its cakes and by capable management and salesmanship, built up a large and lucrative cake business; therefore plaintiff is now estopped from destroying that business by an injunction which would forbid the use of the name "Ambrosia" for the cakes of defendant and its affiliates."

The foregoing, without more, discloses the lack of merit in the instant petition. Further, the failure of petitioner to make a clear, definite and complete disclosure concerning the controversy, as is here evident in his omissions in the petition of the basic facts upon which both lower courts decided the case, furnishes in itself sufficient reason for denial of the writ.—*Furness, Withy & Co. v. Yang-Tsze Insurance Association* (1917), 242 U.S. 430, 37 S.Ct. 141.

## 2. No conflict exists in the decisions.

Petitioner contends that the Fourth Circuit decision is out of harmony with the decisions of this Court in the cases of *Menendez v. Holt*, 128 U.S. 514, 9 S.Ct. 143; *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U.S. 203, 62 S.Ct. 1022; and *Thaddeus Davids Co. v. Davids*, 233 U.S. 461, 34 S.Ct. 648.

Each of these cases are clearly inapplicable on the facts. In the *Menendez* case, this Court stated, "There is nothing here in the nature of an estoppel; nothing which renders it inequitable to arrest at this stage any further invasion of complainant's rights." (9 S.Ct. 143, at 145). The existence of laches and acquiescence by petitioner amounting to estoppel was here specifically found by both lower courts. In distinguishing the cases, the Fourth Circuit took occasion to say that the utter inapplicability

to the instant case of Chief Justice Fuller's opinion in the *Menendez* case is aptly shown by Circuit Judge Buffington in *Pflugh v. Eagle White Lead Co.*, 185 Fed. 769, 772 (Cert. den. 220 U.S. 615), a case where as here facts constituting an estoppel were present. (R. 106) The further fact is to be noted that the instant case is even a stronger case than the *Pflugh* case, and was so recognized by the Fourth Circuit, saying (R. 107):

"In the instant case, there was much more than the mere acquiescence and silence of the *Pflugh* case; there was active encouragement and commercial urging by plaintiff to induce defendant to make and vend its cakes under the name 'Ambrosia'."

Decisions of this court supporting the view here taken by the Fourth Circuit include *The French Republic v. Saratoga Vichy Spring Co.*, 191 U.S. 427, 24 S.Ct. 145; *Saxlehner v. Nielson*, 179 U.S. 43, 21 S.Ct. 16; See *Dwinnell-Wright Co. v. White House Milk Co.*, (2 CCA, 1943) 132 F. 2d, 822.

In the *Mishawaka Rubber & Woolen Mfg. Co.* case, this Court granted certiorari "solely to review the provisions of the decree dealing with the measure of profits and damages for the infringement found by the two lower courts." (See 316 U.S. 203, 205, 62 S.Ct. 1022, 1023-1024). The measure of damages is not here involved.

The *Thaddeus Davids Co.* case is likewise clearly distinguishable. Both plaintiff and defendant manufactured ink, using the name, "Davids" on their labels. The Court found that the defendant's use was a "colorable imitation" of plaintiff's label and restrained the defendant only from simulation of the labels. The injunction did not restrain defendant's use of the word, "Davids". (See 34 S.Ct. 648 at 652).

Petitioner's further contention that the Fourth Circuit decision is out of harmony with decisions of other circuits is similarly superficial and unreal. The Circuit Court cases cited on page 7 of the petition are clearly inapplicable here for the reason that the Fourth Circuit did not hold either that "actual confusion between the goods of the parties must be shown to warrant an injunction for technical trade-mark infringement," or that "disparity in the volume of business done by the parties in a particular trade area constitutes grounds for denial of injunctive relief." Petitioner's assertion of these two propositions, which were neither argued nor considered by the Fourth Circuit, and which did not form grounds for its decision of affirmance, is at best but a resort to juristic strawmankilling and we believe, will not be considered seriously by this Court.

Nor is the Fourth Circuit opinion out of harmony on the question of laches and estoppel with cases cited on page 8 of the petition. Petitioner cites the Second Circuit case of *Aunt Jemina Mills v. Rigney & Co.*, 247 Fed. 407, and the Supreme Court case of *McLean v. Fleming*, 96 U.S. 245. The *McLean* case was merely a counterpart of the *Menendez* case and is an authority solely for the proposition that laches, without more, does not bar injunctive relief for trade-mark infringement. It is inapplicable to the instant case for exactly the same reasons as the *Menendez* case.

The *Aunt Jemina* case was specifically considered in the opinion below and found clearly distinguishable on the facts from the instant case. The Fourth Circuit noted that "in the *Aunt Jemina* case, there was no active encouragement to defendant to use the trade-mark in question," and the additional fact that there was actual con-

fusion in that case. (R. 108). Further, the Court in the *Aunt Jemina* case took particular care to state:

"If the complainant had authorized the defendant to use the mark, or even had said it did not object to their doing so, mistake of law would not save it."

*Aunt Jemina Mills Co. v. Rigney*, 247 Fed. 407, 409.

Here, the District Court found as follows:

"Plaintiff enclosed to defendant in said letter a formula for preparing and manufacturing a devil's food cake which had proven popular in the trade in the vicinity of Milwaukee, Wisconsin, to aid defendant to expand and increase its business in manufacturing and selling Ambrosia cakes, and to encourage defendant to use plaintiff's products in making the Ambrosia cake."

(R. 16; Findings of Fact No. 32)

The foregoing makes clear the inapplicability factually of the *Aunt Jemina* case, to this case. However, even assuming there were a conflict between this case and the *Aunt Jemina* case, such conflict was resolved by the Second Circuit in the case of *Dwinnell-Wright Co. v. White House Milk Co.* (2 CCA 1943), 132 F. 2d, 822, decided more than twenty years after the *Aunt Jemina* case. The Second Circuit, the only Circuit relied on by petitioner manifestly cannot be said to be in conflict with the decision below.

3. No important question of trade-mark law of general importance is here presented.

Petitioner makes no reference to this point in his brief and argument. However, it is stated in his petition as a

reason for granting the writ, with the contention that the Fourth Circuit by its decision "denied petitioner's property right in its trade-mark". (Petition for Writ, page 7).

The District Court found that the businesses of petitioner and respondent were "separate and distinct fields of commercial enterprise" (R. 13); that their products were "not competitive" (R. 13); that "no actual confusion or reasonable likelihood of confusion or intent to deceive is indicated by the evidence" (R. 17); that the word "Ambrosia" was "a common word of long usage, signifying, super-excellence" (R. 4).

This contention of petitioner is fully answered by the decision of this Court in the *American Steel Foundries* case. There the Court stated:

"The mere fact that one person has adopted and used a trade-mark on his goods does not prevent the adoption and use of the same trade-mark by others on articles of different description. There is no property in a trade-mark apart from the business or trade in connection with which it is employed."

*American Steel Foundries v. Robertson* (1926),  
269 U.S. 372, 46 S.Ct. 160, 162.

See:

*Arrow Distilleries v. Globe Brewing Co.* (4  
CCA 1941), 117 F. 2d 347.

4. The District Court did not depart from the accepted and usual course of judicial proceedings.

Petitioner states in support of his contention on this point that "the trial court adopted verbatim the findings proposed by Counsel for the respondent as to all of the crucial contested matters." (Petition p. 22.)



In the first place, the statement is not supported by the record. This is made plain by a comparison of the District Court's first seven findings of fact (R. 7-8) with petitioner's requested finding number I to VII (R. 77-78). The Court did adopt substantially respondent's requested findings subsequent to its finding No. 7. However, the Court made corrections and changes in certain of these requested findings to make them conform to the Court's view of the oral and record evidence adduced on the trial of the cause.

In the second place, the District Court with painstaking care prepared a separate written opinion (R. 2-6), setting forth its findings and conclusions, the correctness of which is manifest. We submit that but scant consideration can be given to an argument of petitioner which seeks to substitute an attack on the District Court for the manner in which it prepared its findings of fact for his failure to point out wherein the court's findings failed to find support in the record or "were clearly erroneous" (See Rule 52(a), Federal Rules of Civil Procedure), particularly where the findings were concurred in and approved by Circuit Court on appeal.

On the contrary, the District Court met every requirement of law in the form and manner of preparation of its findings, this is readily apparent in the following quoted excerpt from the decision of this Court in the *Everglades Drainage District* case, namely:

"We hold only that there must be findings, stated either in the Court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion".

*Kelly v. Everglades Drainage Dist.* (1943), 319 U.S. 415, 422, 63 S.Ct. 1141, 1145 *Per Curiam*

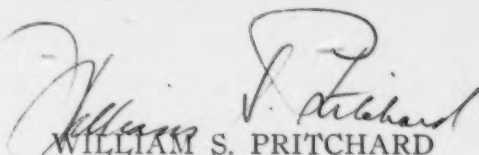


See:

*United States v. Crescent Amusement Co.*, 323  
U.S. 179, 184, 65 S.Ct. 254, 260.  
*Saco-Lowell Shops v. Reynolds* (CCA 4, 1944),  
141 F. 2d 587, 589.

### CONCLUSION

The decision of the Circuit Court of Appeals for the Fourth Circuit is correct, and no conflict of decisions is involved. Petitioner seeks here to again review, facts found by the District Court, unanimously concurred in by the Circuit Court of Appeals. The issue sought to be presented is largely factual, and is of importance only to the parties to this suit. No question of Federal Law, not heretofore settled by this Court is presented. We respectfully submit that the petition for writ of certiorari should be denied.



WILLIAM S. PRITCHARD

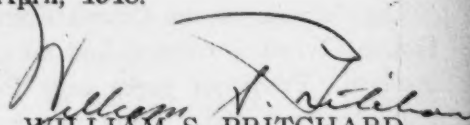
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day mailed a copy of the foregoing Brief of Respondent, postage prepaid, to Ira Milton Jones, Esq., Milwaukee, Wisconsin and to Thornton H. Brooks, Esq., Greensboro, North Carolina, Attorneys for Petitioner.

This 9th day of April, 1948.



WILLIAM S. PRITCHARD

*Attorney for Respondent.*

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